

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Date Issued:** August 16, 2001

**BALCA Case No. 2000-INA-183**  
[ETA No. P1998-NY-02366388]

*In the Matter of:*

**LEIH MITTELMAN,**  
*Employer,*

*on behalf of*

**ALINA BALCERZAK,**  
*Alien*

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Andrew J. Olshevski  
Brooklyn, NY  
For Employer

Before: Burke, Vittone and Chapman  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written arguments. 20 C.F.R. 656.27(c).

**STATEMENT OF THE CASE**

On March 28, 1997, Employer, Leih Mittelman, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 4-9). The duties were listed as follows:

Prepare and cook family style, Kosher cuisine, foods & meals.  
Serve meals. Assist the owner in menu preparation & purchasing foodstuffs. Check foodstuffs for quality & quantity. Cook foodstuffs in quantities according to the number of guests and as suitable for occasion. Plan & follow sequence & time of cooking operations with meal serving hours and daily menu. Cook & prepare hot & cold meals for cocktail parties, family & social gatherings. Decorate table.  
Wash & iron table linens. Wash dishes.

(AF 9). Employer required two years of experience in the job offered. *Id.*

On June 28, 1999, the CO issued a Notice of Findings ( "NOF"), noting that "the requirement that applicants have experience in a particular type of ethnic/religious food is employer's personal preference and not a normal job requirement." (AF 18). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of Kosher cuisine or submit evidence to show that a business necessity warranted the requirement pursuant to §656.21(b)(2). *Id.* The CO also questioned whether the position presented a bona fide job opportunity under §656.20(c)(8). (AF 19-20).

On July 31, 1999, Employer filed her Rebuttal to the NOF, which primarily supplied answers to the twelve questions presented in the NOF regarding the existence of a bona fide job opportunity. (AF 30-38). Employer, however, did state that since she frequently entertains family, friends, and business clients for Jewish holidays and business meetings, Employer requires a cook specializing in the preparation of Kosher foods. (AF 33-34). Nonetheless, Employer said she was unable to submit an entertainment schedule because she could no longer remember details such as the dates of the events or the number of guests invited. (AF 33).

On November 3, 1999, the CO issued her Final Determination ("FD"), denying the application on the ground that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement. (AF 39-41).

On December 4, 1999, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 50-56). Neither a statement of position nor a legal brief has been received since the case was docketed.

## **DISCUSSION**

In *Martin Kaplan*, 2000-INA-23 ( July 2, 2001) (*en banc*), the Board held that "cooking specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23, slip op. at 3. To establish business

necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer.

*Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan, supra*, slip op. at 10.

Since this is an application for a cook who is familiar with Kosher foods and/or with the preparation of traditional Jewish cuisine, the first prong of the *Information Industries* test may require consideration of Employer's religious practices. See *Kaplan, supra*, slip op at 10. From the record, however, it is difficult to surmise whether Employer herself maintains a Kosher home, and thus, it is difficult to determine whether Employer intended to hire an individual to prepare traditional Jewish foods, cook according to the laws of Kashruth, or both. This case, however, may be decided based on the second prong of the business necessity test alone, and therefore, we will forgo an analysis of the first prong and move directly into a discussion of the second prong.

In the NOF, the CO informed Employer that she may rebut her finding that the requirement for a cook with two years' experience preparing Kosher foods or traditional ethnic Jewish cuisine was unduly restrictive by providing evidence that:

- 1) An applicant with two years of cooking experience could not readily adapt to a Kosher style of cooking<sup>1</sup>;
- 2) An applicant with no prior experience in Kosher cooking is incapable of preparing Kosher food; and
- 3) Neither Employer nor anyone else in her family is able to provide training or instruction in the Kosher cooking tradition.

(AF 17-18).

Employer, however, failed to provide any such evidence. In her Rebuttal, Employer maintained that "Kosher Style cuisine is – like any other national or religion-based cuisine – very specific in recipes and ingredients. It relies on very detailed knowledge of religious requirements." (AF 31). Normally, an employer's unsupported assertions are not sufficient to

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<sup>1</sup> Although Employer was put on notice of the deficiency, the CO did not distinguish between "Kosher-style cooking" and "Kosher food." "Kosher-style cooking" does not technically exist, but it can be inferred to refer to traditional ethnic Jewish foods such as blintzes, matzo ball soup, and bagels. On the other hand, "Kosher food" refers to foods cooked in accordance with Jewish law (*e.g.*, no mixing of meat and dairy, no use of meats that are not slaughtered under strict rabbinical supervision, etc.). See *Kaplan*, 2000-INA-23 (July 2, 2001)(*en banc*).

carry its burden of proof, but are evidence that must be considered and given the weight it rationally deserves. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). However, here, Employer's assertion carries little weight since it is not accompanied by supporting reasoning or concrete evidence. Therefore, Employer's statement fails to prove that an otherwise experienced domestic cook is unable to learn how to handle Kosher foods or prepare traditional Jewish foods within a reasonable period of taking the job.

Employer also contended in her Rebuttal that "it is highly unreasonable to assume that there will be anyone willing to provide training while at the same time paying the [sic] salary exceeding \$19,000. Given the fact that the prospective employer and her spouse work, there is no possibility for them to provide an inexperienced applicant with adequate training even if they themselves were qualified to provide such training which they are not." (AF 31). Incapacity to provide training, however, does not furnish evidence relating to the length of time it takes to become familiar with the laws of Kashruth or traditional Jewish recipes. Nor does it suggest that someone without experience cooking traditional Jewish or Kosher foods cannot learn how to prepare the cuisine via another method, such as through the consultation of cookbooks. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked the requirement to successful execution of the job.

## **ORDER**

Since we find that Employer has not documented that two years of experience in the cooking specialization is supported by a business necessity, we **AFFIRM** the CO's Final Determination denying alien labor certification.

**SO ORDERED.**

Entered at the direction of the Board by:

Todd R. Smyth  
Secretary to the Board of Alien Labor  
Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is

necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.